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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 1153

HAROLD E. FERGER, WILLIAM J. NORTON, PATRICK F. NORTON, and COLUMBUS P. BRITTAIN,

Petitioners,

vs.

LOCAL 483 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, etc.,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI AND MEMORANDUM ON BEHALF OF RESPONDENT

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Statute Cited

29 U.S.C.A. (Labor Management Reporting and Disclosure Act):

Secs. 101 (a) (1), 411 (a) (1) 2, 3, 7, 9, 11

Sec. 101 (a) (5) 7

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Counter-Statement of the Questions Involved

1. Is the issue here presented a subject of conflict between the several Circuit Courts of Appeal?

2. Did the Congress intend to provide relief of a broader nature than the relief granted herein?

3. Does the doctrine of the "law of the case" apply to this proceeding?

4. Will the Court, on review of a denial of a motion to hold in contempt, undertake to amend or modify the form of the original judgment from which the petitioners did not appeal?

Statement of the Case

This is on a petition for certiorari to review, not the entry of a judgment or its affirmance or reversal, but the affirmance of an order refusing to hold defendant in contempt.

This action was brought to enforce plaintiffs' alleged rights under 29 U.S.C.A. Sec. 411 (a) (1) (Section 101 (a) (1) of the Labor Management Reporting and Disclosure Act).

Since a plaintiff's rights under this section of the Act are dependent upon his membership in the defendant union, the pre-trial order (Appendix, p. 11a, l. 4) stated that "plaintiffs allege denial of their rights under section 101 thereof as members of defendant union."

Defendant's principal contention, reserved by it in the trial court and in the Court of Appeals, consisted of a denial that plaintiffs were members of the defendant local union. This contention had been overruled by the Court of Appeals for the Third Circuit, but it was pressed by the defendant nevertheless, in the hope that the rule of law originally adopted by the Third Circuit in *Hughes* v. *Local 11,* 287 F. 2nd. 810 (1961) would be reconsidered and modified. It was the defendant's contention that membership in the local did not exist until after the plaintiffs were transferred, and that the rights secured by Section 101(a)(1) did not accrue until such membership was in existence. It was defendant's further contention that the plaintiffs already had an adequate remedy in the State courts—an action in equity to enforce their rights under the International Constitution. It has never been denied that the action in the State Court would have been adequate or available.

As is stated in the Petition for Writ of Certiorari, following the judgment in the trial court, but prior to argument

before the Court of Appeals, the International Constitution was amended so as to obviate this type of problem in the future. Thus, except for the four plaintiffs alone, the problem presented in this case was purely academic.

When, therefore, the Court Appeals declined to reconsider or modify the rule of law established in *Hughes,* but affirmed the judgment in the form fixed by the trial court, the defendant local decided not to seek further review in this Honorable Court, since the form of the judgment was such as did not seriously embarrass or prejudice it.

Thus, the original decision of the Court of Appeals, affirming the judgment below, remained without an attempt to seek a review thereof.

At this point, we must refer to the following significant facts:

1. Plaintiffs have not at any time been financially or economically prejudiced. The record in the trial court shows that they worked regularly, were not interfered with in respect to their employment, they enjoyed the benefits of the joint welfare fund during sickness of themselves or their dependents. They are merely required to pay their dues to their original local union rather than to the defendant.

2. Plaintiffs sought an order from the trial court which would require defendant to accept their transfers. Defendant objected to that order, and sought a judgment limited specifically to the rights named by Section 101 (a)(1).

The trial court *denied plaintiff's motion* for the broad relief, and, on defendant's motion, entered judgment *limited to the rights specified in Section 101 (a)(1).*

All of this appears in the Appendix submitted to the Third Circuit, on pp. 275a, 276a, and 277a.

3. Furthermore, the Trial Court, in its opinion, on pp. 274a-275a, specifically limited the relief in the manner indicated by the judgment. It said, *inter alia,*

> "The plaintiffs' request that the court enter judgment obligating the defendant Local 483 to grant them membership in defendant Local. *The Hughes case, however, indicates that an order so framed may be improper.* The court there points out that the right to transfer is not specifically enumerated in Section 101 (a)(1) of the LMRDA. (29 U.S.C.A. Sec. 411 (a)(1). This section does guarantee to them the right 'to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings * * *.' *They are entitled to all rights guaranteed to members by the LMRDA but are not entitled, under this statute, to any additional rights of members not guaranteed by this statute.*" (Emphasis supplied.)

4. In spite of the contrary language of the trial court's opinion, and in spite of its denial of plaintiffs' motion for entry of their form of judgment, *plaintiffs made no effort to appeal or seek review of the form of judgment.*

5. After the affirmance of this judgment, and the decision of defendant to seek no further review of the substantive issue involved, plaintiffs *sought to hold defendant in contempt for refusing to do what the trial court refused to order*—to accept a transfer or admit defendants into membership. It is the refusal of the trial court to hold defendants in contempt from which this appeal was taken, and which is here sought to be reviewed.

6. Petitioners make much (their brief, p. 5, second paragraph) of the statement of defendant's counsel on the application for a stay that "If the judgment is enforced giving plaintiffs membership in defendant union the basis for the appeal would be moot . . . ."

In doing so, petitioners are, we believe, unintentionally *misleading* the Court, by considering the matter out of context. The application for a stay was made in the face of an application for a contempt order, arising out of a refusal by defendant at that time to accept a transfer and admit petitioners to membership.

If the petitioners had succeeded in their motion at that time, defendants would have been compelled to admit petitioners to membership. Counsel's statement in that context was eminently correct, yet not an admission that the judgment itself contained such a provision.

7. On p. 6 of their brief, petitioners, in the last paragraph, say that the defendant has denied to them "the right to run for office." This is a flagrantly false statement, and one which has never appeared in the record anywhere, by affidavit, testimony, or even by an oral or written statement of counsel.

Thus, petitioners here seek, on an application to review a refusal to hold in contempt, to review and modify the judgment of the trial court which has been before the Court of Appeals, to which they never objected, from which they never appealed, and which they knew at the time of the entry was a denial of their application for broader relief.

The oddity of the present situation is that the petitioners have secured a judgment granting them certain rights of membership, *on the basis of the Hughes ruling that they are already members,* but now contend that the defendant

should take action to accept their transfers so as to make them members.

This anomalous situation derives from what we conceive to have been an erroneous opinion in *Hughes*, which we sought to review on the original appeal. That stage, however, has passed; the issue is academic and moot, in the light of the amendment to the International Constitution; the defendant union therefore abandoned its efforts to seek further review of that decision.

Since the form of the judgment was not appealed by the petitioners, it became final upon affirmance by the Court of Appeals and the exhaustion of the time within which to seek a writ of certiorari.

Defendant is fully complying with the terms of the judgment. Petitioners are, in effect, seeking to modify the judgment without ever having objected to it or appealed from it.

ARGUMENT

This argument is designed to respond to the arguments advanced by petitioners as grounds for the granting of the writ, and each point will directly respond to the corresponding point made by the petitioners.

POINT I

The opinion of the Court of Appeals for the Third Circuit is not in conflict with the opinion of any other circuit.

In fact, this decision is the first and only case in point. No other decision has been found by us (other than *Hughes*,

supra) dealing with the rights of a plaintiff under Section 101(a)(1) of the Act.

Petitioners, in their petition, cite three cases, but none of them is in disagreement with the Court of Appeals in the instant case. All of them deal with persons who had been full union members in good standing, who were suspended or expelled in violation of Section 101(a)(5). There was no violation of Section 101(a)(1) alleged.

In *Vars* v. *International Brotherhood of Boilermakers*, 320 F. 2nd 576 (1963) the plaintiff had been illegally expelled. The only possible relief was to set aside the expulsion. This reinstated his membership.

In *Simmons* v. *Local 713*, 350 F. 2nd 1012 (1965), the plaintiff had been illegally suspended. This also was set aside, and damages were granted, on the basis that Section 101(a)(5) had been violated.

Again, *Boilermakers* v. *Rafferty*, 348 F. 2nd 307 (1965) was a case of a violation of section 101(a)(5), not 101(a)(1). A member had been expelled for "libeling" a union officer. The expulsion was set aside, as well as damages being awarded.

Curiously enough, petitioners' brief before the Court of Appeals itself shows that the Third Circuit is not at all in conflict with the three Circuits mentioned, namely, the 2nd, 4th, and 9th. That brief cited the case of *Calabrese* v. *United Ass'n*, 211 F. Supp. 609, aff'd, *per curiam*, 324 F. 2nd 955 (3rd Cir. 1964).

In *Calabrese*, again the plaintiff was expelled from membership in violation of Section 101(a)(5). The setting aside of the expulsion, in exactly the same manner as in *Vars*, *Simmons* and *Rafferty*, was affirmed by the Third Circuit. Obviously, the Third Circuit comprehended the distinction between Section 101(a)(5) and 101(a)(1), and did not

deem its decision in the instant case to be contrary or in conflict with its earlier decision in *Calabrese* or with the three other cases cited by petitioners.

Since petitioners cited *Calabrese* to the court below, it is difficult to imagine why it was not cited in petitioners' present petition, other than to avoid establishing that the Third Circuit is *not* in conflict with the other Circuits.

We submit that it is conclusively established that there is no conflict between the various Circuits.

POINT II

It was not the legislative intent to provide broader relief than here granted.

Under this point, petitioners argue that the constitution of the International Union did not contemplate the present judicial status. However, they overlook that the Court is enforcing, not the constitution, but the statute, which supersedes the constitution.

Had petitioners wished to enforce the constitution, they could have done so by an action in equity in the state courts. They chose whatever rights the statute provided.

The best possible answer to petitioners' argument, however, is found in the *Hughes* decision, *supra,* where the court, considering the relief available, said,

> "One other issue is presented immediately for our consideration, viz., the extent of the relief to which Hughes, is entitled if the allegations of his complaint are borne out. Hughes has asked that he be granted full membership in Local 11. The defendant points out, however, that the right to transfer is not spe-

> cifically enumerated in Section 101(a)(1) and that Section 101(a)(1) only enumerates some of the rights and privileges to which a member of a labor organization is normally entitled. On its face, Section 101(a)(1) purports to enumerate all of the equal rights and privileges which it secures to members of labor organizations. These rights and privileges are 'to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings . . .' Since Hughes is a 'member' of Local 11 within the meaning of the Act, he is entitled to the rights specified. He is also entitled to all other rights accorded to a union member under the Act. But there is no warrant in the statute for granting a member of a labor organization any other membership rights secured to him by the union's constitution and by-laws which are enforceable only under state law in a suit such as that at bar. If, therefore, it is determined on remand that Hughes is entitled to relief, insofar as it is predicated on the Act, *such relief must be limited to that appropriate to secure to Hughes the equal rights and privileges guaranteed by Section 101(a)(1) and other provisions of the Act.*" (Emphasis supplied.)

May we also refer to the footnote added by the Court, which discussed the legislative history, and concluded that,

> "The present language, unlike that in the earlier proposals, does not permit of a construction that would in addition secure to members of labor organizations rights in addition to those specifically set forth."

We submit that the legislative intent to limit relief available under Section 101(a)(1) is clear.

POINT III

The doctrine of the "law of the case", if applicable, should deny relief.

We do not recall relying upon the "law of the case" in oral argument. We did not rely upon it in our brief, nor did the Court of Appeals refer to it.

We therefore do not know why petitioners have made a point of it.

However, we are not here faced with the usual type of case where substantive law, once having been decided, comes before the court as a matter of substantive law in a subsequent proceeding between the same parties.

The case now before the Court does not involve substantive law. It involves merely the determination whether the defendant is in contempt of a judgment which was not attacked on appeal, although the appeal was taken on other issues.

In such a case, the substantive issues having been decided in another proceeding and not being before the court in this case, it may very well be that the "law of the case" is applicable.

Frankly, we have found no authority on this specific question, obviously because it is probably unique. We have found no other case in which a successful party, seeking to enforce a judgment, seeks in addition to modify or reform that judgment, after time for appeal has expired.

POINT IV

This proceeding should not be used to "correct" a ruling not here under appeal.

Under their fourth point, petitioners make three arguments which we beg leave here to paraphrase.

First, they argue that the doctrine of preemption under *San Diego Building Trades* v. *Garmon*, 359 U. S. 236 (1959) precludes the use of state courts to enforce union constitutions.

It is clear that the doctrine of federal preemption relates to labor-management relations, not to intra-union litigation.

In fact, section 103 of the Labor-Management Reporting and Disclosure Act specifically repudiates the concept of preemption. It says,

> "Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal Law or before any court or other tribunal, or the constitution and by-laws of any labor organization."

Congress, therefore, specifically declared that state courts continue to have their powers. It was, instead, intended merely to provide specific and limited additional remedies and rights, whether or not they existed under state law.

Second, they argue that the court, once having assumed jurisdiction, should "dispose of all of it."

However, jurisdiction was assumed under Section 101-(a)(1). The court did grant all of the relief and remedies therein provided. It would not have conformed to Congressional intent to go further.

Third, they argue that the judgment below was broad enough to require the defendant to admit petitioners to membership, or "to accept petitioners' request for transfer."

They try to impute to us the same view. This we have dealt with above, showing the context in which defendant's argument was made. It is utterly untrue that we have ever been of the same view.

However, they also completely overlook, in this argument, the following factors:

1. They moved for an entry of judgment requiring us to accept their transfers.

2. We opposed that motion.

3. The court denied their motion and entered a limited judgment.

4. We appealed from the court's decision, not quarreling with the form of the judgment, but with the substantive law on which it was based.

5. They responded to our appeal, but did not appeal from the form of judgment.

6. Upon affirmance, we complied wholly with the commands of the judgment, a fact recognized by the trial court and the Court of Appeals.

7. The sole issue presently before the Court is an application to punish us for contempt for failure to comply with the judgment.

This is not the proper time or proceeding in which now to test or litigate the remedies to which petitioners may have been entitled. We believe they were entitled to no more than they received, even assuming the complete cor-

rectness of the *Hughes* case. But, having accepted the judgment without appeal, petitioners should not now be heard to object to it.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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